

PASSENGER ASSOCIATION OF ZIMBABWE
and
BERNARD MARIZANI
versus
THE COMMISSIONER GENERAL OF POLICE N.O
and
THE POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 15 & 1 July 2021

Opposed application

W. Mandinde, for applicants
C. Chitekuteku, for respondents

TAGU J: This is a court application for a declaratory relief declaring that members of the Zimbabwe Republic Police are acting unlawfully by spiking public and private motor vehicles in urban areas, particularly in Harare, are acting unlawfully by smashing the windscreens of public and private motor vehicles alleged to be infringing the law and are acting unlawfully by applying excessive force in dealing with alleged road traffic infractions in urban areas, particularly in Harare central business district. The Applicants are seeking an interdict prohibiting members of the Zimbabwe Republic Police employed by the second Respondent and working under the command of the 1st Respondent from spiking motor vehicles and smashing the wind screens of public and private motor vehicles. They alleged that the conduct of the police endangers the lives of the general public and in particular members of the first Applicant commuting in such motor vehicles. Further, the conduct also causes blatant unlawful and malicious damage to property by officers who are supposed to protect private property.

The order sought is couched in the following terms-

“IT IS DECLARED THAT

1. The use of spikes, teargas and the smashing of windscreens of public and private motor vehicles by members of the Zimbabwe Republic Police in dealing with alleged traffic violations be and is hereby declared unlawful as it infringes on the Applicants' right to personal security and the right to life.
2. Alternatively, it is declared that the use of spikes, teargas and the smashing of windscreens of public and private motor vehicles by the Zimbabwe Republic Police in dealing with alleged traffic violations be and is hereby declared unlawful as it is inconsistent with Section 42 of the Criminal Procedure and Evidence Act[Chapter 13.15].
3. The first and second respondents and members acting under their authority and command are interdicted from using spikes, smashing windscreens of private and public motor vehicles and discharging teargas into such motor vehicles when dealing with alleged traffic violations.
4. The Respondents shall pay costs of suit jointly and severally the one paying the others to be absolved.”

FACTUAL BACKGROUND

It is common cause that several private vehicle owners have turned to operating their vehicles as taxis on the guise of the convenience of the general public. These drivers, colloquially referred to as “mushikashika” operate throughout Zimbabwe providing passenger transport services to members of the public for a fee. They do so despite not having a license permitting them to offer such a service in contravention of the Road Motor Transportation Act [Chapter 13.15]. They are just illegal operators and a menace in our roads as the majority of them use unregistered motor vehicles. Members of Zimbabwe Republic Police force have on numerous instances engaged in dog and cat battles with these “mushikashikas” who have no regard for the safety of the members of the public as they bolt at the slight sight of law enforcement officers thereby running over innocent pedestrians. For committing the offence of not having the aforementioned licenses, members of the Zimbabwe Republic Police force have on numerous instances forced to use excessive force in attempting to arrest these “mushikashika” drivers who have the habit of refusing to stop when signaled to stop by law enforcement officers . The Police sometimes resorted to either spiking the vehicles or simply smashing their windscreens. The same tactic has also been used on errand registered commuter omnibus operators who are supposed to be operating legally who turn our roads into a traffic jungle by either driving on the verge of the road or on the right side of the road against the floor of other traffic. Obviously throwing of spikes, teargas and smashing of windscreens of public and private motor vehicles by members of the Zimbabwe Republic Police when enforcing traffic laws is leading to serious bodily injuries, damage to property and in some instances loss of lives. This is a clear violation of the right to life and to personal security. Such conduct is unlawful as it amounts to unreasonable, unjustifiable

actions, but is necessitated by the uncooperative conduct of these illegal operators. It is on this background that the Applicants have approached this court for declaratory reliefs on the basis that the conduct of the Zimbabwe Republic Police Force directly violates s 52 (a) of the Constitution of Zimbabwe, Amendment No. 20 of 2013 which provides that,

“Every person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources” as well as the right to life. Additionally, in terms of section 219 (1) (c) and (e) of the Constitution of Zimbabwe, the Police Service is obliged to protect and secure the lives and property of the people of Zimbabwe and to uphold the Constitution.

Further, it was submitted by the Applicants that sight should not be lost to s 42 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which limits right to personal security by allowing arresting officers, including ZRP officers to use reasonable, justifiable and proportionate force (minimum force) to overcome resistance upon arrest. Section 42 reads as follows;

“42 Resisting arrest

- (1) If any person who is authorized or required under this Act or any other enactment to arrest or assist in arresting another person, attempts to make the arrest and the person whose arrest is attempted resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the person concerned cannot be arrested without the use of force, the person attempting the arrest may, in order to effect the arrest, use such force as may be reasonably justifiable and proportionate in the circumstances to overcome the resistance or prevent the person concerned from fleeing:

Provided that the person attempting the arrest is justified in terms of this section in using force against the person concerned only if the person sought to be arrested was committing or had committed, or was suspected of having committed an offence referred to in the First Schedule, and the person attempting the arrest believes on reasonable grounds that-

- (a) the force is immediately necessary for the purpose of protecting the person attempting the arrest, any person lawfully assisting the person attempting the arrest or any other person from imminent or future death or grievous bodily harm; or
 - (b) there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
 - (c) the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.
- (2) For the avoidance of doubt it is declared that no use of lethal force for the purpose of subsection (1) shall be lawful unless there is strict compliance with the conditions specified therein.”

It is the contention of the Applicants that the conduct of the ZRP falls outside the requirements outlined in the provision.

The present application was strongly opposed by the 1st Respondent.

In his Notice of Opposition to the application the 1st Respondent made the following submissions which I found to have a lot of merit. He said the assertions being made by the Applicants show that their intention is somehow not only meant to protect passengers or the public but to encourage an illegality. It seems the Applicants are inviting this court to sanitize the illegal operation of the so-called “mushikashika” operators whom the Applicants are supporting are just a menace in the Zimbabwean roads and more particularly in the Central Business Districts. They are a danger to themselves, the public and the police as well, in light of the Covid-19 pandemic scare. He said the government put in place guidelines to curb the spread of Covid-19, chief among them being, the issue of transportation of the public by ZUPCO registered buses. The 1st Applicant’s members are generally putting their lives at risk by opting to use illegal forms of transport other than the designated ZUPCO, considering the issue of Covid-19. Furthermore, some members of the public who make use of unlicensed passenger transport end up being kidnapped or robbed by criminals who pick up unsuspecting members of the public at undesignated pick up points. Therefore, the 1st Applicant’s averment which tend to encourage or allow “mushikashika” to continue operating contrary to the law, should be condemned, despite the other issues raised. He therefore, as I also do, do not condone the conduct of police officers who conduct traffic patrols in CBD who smash vehicle windscreens, spikes or use teargas on vehicles full of people.

On the issue of spikes, he said sight cannot be lost to the fact that at certain roadblocks, the police can still use spikes as an effective minimum force tool like any other police service in other jurisdictions. Hence use of spikes at roadblocks cannot out rightly be declared unlawful because they are one of the essential tools used world over to stop vehicles in the event that the criminals try to evade or flee passing through set up roadblocks. Whilst it is accepted that in certain instances the conduct of the police may result in bodily injury or damage to property, it is important to highlight that the conduct of the illegal commuter omnibus and “mushikashika” drivers is the major cause for the unfortunate incidents, police officers have a Constitutional mandate to enforce all laws in Zimbabwe as mandated in section 219 of the Constitution of Zimbabwe Amendment No. 20 of 2013, but some drivers operating illegally in the roads have unruly, intolerable and disorderly behavior. There is no reason why the drivers should flee away from the police when instructed to stop. The law requires that any driver who is instructed by a police officer to stop,

must stop. Some drivers can even drive towards the police officers or members of the public thereby putting the life of both the police officers and members of the public at risk. Therefore it is wrong to suggest that the conduct of the police could be the only cause for the injuries or harm caused to the pedestrians and passengers.

During the hearing of this matter the court even asked the counsel for the Applicants as to what the police should do where a motorist is stopped at a check point or at any other place and the motorist flees. A suggestion was made by the Applicants that the police can arrest illegal taxi operators without resorting to use of force. For example, they can note the vehicle number plates and use the Vehicle Inspection Department (VID) to trace the culprits without putting the life of the people in danger. That is a novel idea, but sight should not be lost of the fact that most of these “mushikashika” vehicle are not even registered hence recording or noting of registration numbers will be an excise in futility.

The Applicants submitted that they have established the requirements for a declaratur and interdict. These are-

1. The applicant must show that it is an interested person;
2. There is a right or obligation which becomes the object of the injury;
3. It is not approaching the court for what amounts to a legal opinion, an abstract or academic matter;
4. There must be interested parties upon which the declaration will be binding;
5. Considerations of public policy favour the issuance of the declaratory;

As to requirements for an interdict these are-

1. A clear right on the part of the applicant;
2. Actual or reasonable apprehended injury; and
3. Absence of any other remedy by which the applicant can be protected with the same results.

See MDC v President of the Republic of Zimbabwe & Ors HH28/2007 and *Flame Lily Investments Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378; *Setlogelo v Setlogelo* 1914 AD 221, *Johnsen v Agricultural Finance Corporation* 1995 (1) ZLR 65.

In the present case, as far as the declaratur is concerned the Applicants submitted that they are interested persons. The 1st Applicant represent the interest of the passengers which are directly affected by the conduct of the police and the 2nd Applicant is directly affected and is seeking a relief for himself. Hence the declaration will be binding on Respondents to respect the rights of the Applicants, and it is in public interest for the issuance of this declaratory order in protecting rights of the Applicants and the public in general. As to the interdict the Applicants submitted that the Applicants have clear rights. They said the conduct of the members of the police has caused harm to passengers of public and private motor vehicles and in some unfortunate cases, the death of victims. Hence Applicants have reasonable apprehension that the security of more passengers is endangered, private property will be damaged and there is no alternative effective remedy in the circumstances. The Police should be barred in practicing this rudimentary and barbaric way of enforcing traffic offence laws.

On the other hand the Respondents submitted that this matter is not a proper one for the court to issue out a declaratory order as the use of spikes, teargas and smashing of windscreens of public and private motor vehicles by members of the Zimbabwe Republic Police in dealing with alleged traffic violations is lawful as it amounts to reasonable use of force and is in line with the Constitutional duty of the police to maintain law and order. Further, the relief which the Applicants are seeking is too broad and lacks precision. If the declaratory order is granted, it has the effect of not just affecting how the police enforce traffic laws but also other crimes as well. Traffic law violations are not the only crimes that are committed on the road and the ban will affect those as well as the police will engage in high –speed pursuits of suspects who if the order is interpreted literally will be committing a traffic violation as well as other crimes.

A term traffic violation does not have just one meaning and it can be subject to numerous interpretations. A practical example is a situation where the police are engaged in a high –speed chase with armed robbers. The police will not be able to use the methods cited by the Applicants because technically the robbers are violating traffic laws through speeding which greatly hinders the enforcement of the law by the police. The declaratory order and the interdict sought by the Applicants will cause further litigation rather than prevent it. *In casu*, the relief sought by the Applicants does not clarify the position of the law but rather causes uncertainty because it is not clear what exactly it is they want. Do the Applicants want the methods banned in urban areas or

throughout the whole country? Is the order applying only to unlicensed pirate taxis or to every motor vehicle?

It was the Respondents' contention that the Zimbabwe Republic Police has already implemented internal procedures that have limited the use of spikes, teargas and smashing of windscreens by police officers for traffic violations hence the application has been overtaken by events, because the police have been discouraged from throwing spikes at moving vehicles but rather to follow the procedures set out in the Zimbabwe Republic Police Weapons and Equipment Coin and I.S. Manual (Methods and Frequency), a handbook for police officers which provides instructions on how they should use their weapons and equipment. Therefore the application by the Applicants has been overtaken by events as the police have changed the way they enforce traffic laws.

The Respondents therefore, submitted that teargas is not used in enforcement of traffic violations. To them the assertion that the use of spikes and smashing of windscreens has led directly to the deaths of innocent citizens is misleading. The police only resorted to using such methods to deal with pirate taxis that have run rampant on the roads and willingly break laws on the road and have caused most of the road accidents that have occurred on the roads and led to the deaths of innocent citizens. These are the "mushikashikas".

In assessing the use of force by the police, one has to put himself into the shoes of the police to assess whether the amount of force used is reasonable or not. According to the Respondents the operators of "Mushikashikas" are not just committing traffic violations only but also other crimes that can be classified as 1st Schedule offences. These crimes include abusing drugs, harassment of commuters especially women, theft and robberies committed by these unregistered motor vehicles driven by immature, unlicensed, and not fully equipped and knowledgeable to serve in the public transport industry people. There have been reports of deaths of pedestrians as a result of being run over by motor vehicles. The pirate taxis tend to flee and resist arrest whenever they see the police. Touts who operate with these errand drivers even assault and kill police officers when the police try to impound their vehicles and arrest them. To grant the application would be tantamount to legalizing the actions of these errant motorists as the police would be incapacitated to deal with them.

While the application has been filed to protect commuters, one thing that boggles this court's mind is why members of the 1st Respondent have this high affinity for boarding illegal vehicle at undesignated points while there are conventional transport such as ZUPCO or registered taxis?. I therefore agree with the Respondents that the order being sought by the Applicants, that there be a blanket ban on the use of spikes, teargas and on exceptional circumstances smashing of windscreens is unassailable. However, this is not to say the police should do so, because it is illegal, but circumstances may dictate that it be done. The requirements for declaratory orders and interdicts have not been satisfied as the Applicants are viewing the matter from one angle without also paying regard to the other side of the coin. For the court to do so would be to sanitize crime and disempower the police from enforcing law and order.

For these reasons the application will fail as the Applicants are approaching the court with dirty hands.

IT IS ORDERED THAT

1. The application is dismissed.
2. The Applicants to pay costs on a legal practitioner and client scale.

Zimbabwe Human Rights NGO Forum, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners.